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No. 07-818

FILED

JUN 2 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GOSS INTERNATIONAL CORP.,

Petitioner,

v.

TOKYO KIKAI SEISAKUSHO, LTD. AND TKS (USA), INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES

HOKEN S. SEKI
LAW OFFICES OF HOKEN S. SEKI
225 Deerpath Road
Suite 224
Lake Forest, IL 60045
(847) 234-5252

PETER J. TOREN
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
LAWRENCE R. WALDERS
NEIL R. ELLIS
RICHARD D. KLINGLER
BRIAN E. NELSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc.

* Counsel of Record

June 2, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

As might be expected in a case addressing the sole judgment resulting from a now-repealed statute, the United States confirms that each of petitioner's main contentions in favor of this Court's review is without merit. The Eighth and Second Circuits do not conflict over whether ancillary jurisdiction exists to support an antisuit injunction after payment of a money judgment, and no multi-circuit split exists regarding the treatment of international comity. Petitioner's claims of a conflict concerning the antisuit standard that applies to a foreign proceeding after entry of final U.S. judgment are, as the United States shows, simply imagined. And, the only practical implication of other nations' clawback statutes is that review here would potentially interfere with the conduct of our Nation's foreign policy. Finally, the United States does not mention that the proceedings in Japan have now been ongoing for almost a year and an injunction at this stage in the proceedings would particularly harm U.S-Japanese relationships. Thus, even if the questions presented by petitioner had been worthy of review, it still would be inappropriate to grant certiorari now.

While urging the Court to deny further review for these and other reasons, the United States wrongly faults the Eighth Circuit's opinion on three grounds. One focuses on an aspect of the decision that, as the United States concedes, is effectively dicta not clearly related to the holding, which itself "is necessarily case-specific." US Br. 17-18. The other two rest on policy rather than legal objections to the opinion and, upon examination, actually provide further reasons not to grant certiorari. The United States objects to the Eighth Circuit's reliance on international comity

rather than limiting itself to the "public policy" reflected in the repeal of the statute resulting in judgment. This Court has, however, rejected the proposition that courts are to function as auxiliaries of the State Department in this manner, and the United States cites no precedent for its peculiar conception of the judicial role. Similarly, the United States faults the Eighth Circuit for failing to recognize the common "issues" in the domestic and Japanese proceedings, yet it reaches that conclusion by ignoring the legal issues before the respective courts and instead analyzing the point as a diplomat would. The United States does not suggest that any foreign policy consideration favors review, which would only thrust this Court into a thicket of non-legal, policy matters traditionally left to the Executive Branch and neither presented nor addressed in the decisions below.

ARGUMENT

I. THE UNITED STATES CONFIRMS THAT EACH OF PETITIONER'S MAIN CONTENTIONS IS WITHOUT MERIT.

Petitioner seeks this Court's review based on (i) a purported split between the Second and Eighth Circuits concerning ancillary jurisdiction following satisfaction of a money judgment; (ii) an "important" conflict among nine circuit courts regarding the treatment of international comity in analyzing antisuit injunctions, Pet. 16, 19; (iii) conflict among the circuits regarding the treatment of comity, for foreign suits, following entry of U.S. judgment; and, along with *amici*, (iv) the "broad application" of the Eighth Circuit's decision to foreign clawback statutes, Pet. Rep. 10. The United States now confirms that none of these assertions is accurate or provides any basis to support this Court's grant of certiorari.

The "split" between the Second and Eighth Circuits is, as the United States confirms, illusory. Petitioner rests its claim on the supposed divergence between the courts regarding whether ancillary jurisdiction supporting an antisuit injunction exists following the satisfaction of a money judgment. According to petitioner, the Second Circuit held in the affirmative and the Eighth Circuit held in the negative. Pet. 17-18. The difficulty with this claim is that the Eighth Circuit set forth no such holding. At best, the decision is "unclear" on this point, analyzes instead whether the same "issues" are common in the domestic and foreign proceedings, but "can also plausibly be read" as addressing the money judgment issue. US Br. 13-14. It is absolutely clear, however, that the Eighth Circuit's treatment of jurisdiction following satisfaction of a money judgment is dicta and thus no basis for this Court's review: on the basis that different issues were before the Japanese and domestic courts, the Eighth Circuit held that international comity required and provided the principal, independent basis for vacating the injunction. See Pet. 54a-60a. So understood, the decision "would not conflict with the Second Circuit's jurisdictional holding ...." US Br. 17.

Similarly, there is no multi-circuit "conflict" concerning international comity. The circuits "all ... give weight to comity concerns," and their slightly different formulations of the issue have not "actually produced different results in cases with comparable facts." US Br. 18. Even if the different formulations had any practical significance, review of this case would be limited to an issue of no precedential value that "no court will ever be asked ... again." *Id.* at 19.

As the United States diplomatically points out, petitioner simply imagines a "conflict" caused by the

Eighth Circuit decision and related to comity as applied to the treatment of foreign suits following entry of final U.S. judgments. The Eighth Circuit did not "reject the 'settled' rule" and instead reasoned in a manner that "is difficult to reconcile with petitioner's characterization of the court's holding." US Br. 21. Indeed, petitioner can "identify [no] language in the opinion below that gives rise to the alleged conflict." *Id.*

Finally, contrary to petitioner's and its *amici*'s breathless warnings, the Eighth Circuit's decision presents no issue of significance concerning other "clawback" statutes. The United States might be expected to have a hair-trigger sensitivity to the use of such statutes as an instrument of international trade, but finds no cause for concern: "the United States is unaware of any other application of a foreign clawback statute against the United States in recent years, and it is not clear to what extent such cases will arise in the future." US Br. 20. The United States emphasizes that consideration of the issue in this case would have no precedential value because the statute has been repealed and was found by the WTO to violate international legal obligations. *Id.* And, this Court's review could interfere with "sensitive diplomatic ... questions." *Id.*

In sum, this case presents no conflict among the circuits or with decisions of this Court, presents no issue of general significance, and would result in a decision of this Court with no precedential value or broader effect other than potential harm to U.S. foreign policy interests.

II. THE EIGHTH CIRCUIT DID NOT "ERR" AS SUGGESTED BY THE UNITED STATES, WHICH FOCUSES ON POLICY RATHER THAN LEGAL CONCERNS THAT FURTHER COUNSEL AGAINST THIS COURT'S REVIEW.

In the course of confirming that this Court's review is unwarranted, the United States suggests that the court below erred in certain respects. Those claims either rest on concededly alternative readings of the Eighth Circuit decision or are related to the U.S. government's disagreements with EU, WTO, and Japanese officials' conclusions that the U.S. has not brought itself into compliance with its international treaty obligations. In essence, the United States faults the Eighth Circuit for focusing on traditional legal concerns rather than treating the case as a State Department official might. As this Court has elsewhere indicated, such policy perspectives are best advanced through diplomacy rather than judicial action, providing yet another reason that the Court should decline to review this case.

1. The United States claims that the Eighth Circuit may have erred in three respects. For the most important issue, whether ancillary jurisdiction exists after a money judgment has been satisfied, the United States acknowledges that it is "unclear" whether the Eighth Circuit's holding even rested on this issue. US Br. 13; see *id.* at 18. The government acknowledges that "[t]here is language in the court's opinion that could be viewed as limiting its holding to situations in which the issues to be litigated ... in the second proceeding are different from those in the earlier proceeding," *id.* at 13, and for the reasons outlined above this is clearly the better interpretation of the Eighth Circuit's opinion. See *supra* at 3. In

any event, this Court's review would be pointless for "error" correction of dicta without foreseeable prospective effect and touching on an issue that "arises only infrequently." US Br. 17.

2. The United States identified two other "errors" of the court below. As described below, the asserted bases for these errors are not that the Eighth Circuit's opinion departed from established law, but rather that the opinion's implications did not mirror the Executive Branch's foreign policy positions. These are not legal errors at all, and the risk that further judicial action might substitute for diplomatic initiative counsels against, rather than in favor, of this Court's review. See, *e.g.*, *Medellin* v. *Texas*, 128 S. Ct. 1346, 1363 (2008); *Dames & Moore* v. *Regan*, 453 U.S. 654, 686-87 (1981); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); *infra* pp. 10-11.

One of the two issues concerns whether an antisuit injunction might be appropriate because the Japanese proceedings would address "an issue that previously was presented to and decided by the federal court." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988); see also *Peacock* v. *Thomas*, 516 U.S. 349, 358 (1996) ("In determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief sought is of a different kind or on a different principle than that of the prior decree.") (internal quotation marks, alteration, and citations omitted). Under this traditional approach, the issues before the domestic and Japanese courts are clearly different: one proceeding addressed whether petitioner satisfied the distinct elements of the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004), and the other addressed respondents' ability to

claim against petitioner under a separate statute. The United States concedes this point: "[i]t is true that an action under the Special Measures Law [Law No. 162 of 2004 (Japan)] would not permit respondents to relitigate the underlying factual questions, or whether governing United States law imposed liability under such circumstances." US Br. 12.

This concession resolves the matter in support of the Eighth Circuit's reasoning under the test set forth in *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. at 147, and other leading cases, but it does not end the matter for the United States. Instead, the United States redefines the relevant "issue" in diplomatic rather than legal terms: "whether petitioner was entitled to be compensated for respondents' conduct in allegedly 'dumping' printing-press equipment in the United States ...." US Br. 12.[1]

This "issue" was not and will not be before either the district court that issued the antisuit injunction or the Japanese court that is handling the pending litigation under the Special Measures Law. It is framed at a level of generality far beyond that considered by judges and for which the antisuit injunction tests are designed. The district court considered facts bearing on each element of the 1916 Act. The Japanese court is now reviewing separate issues related to the nature of the parties before it

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[1] The United States' failure to address res judicata is particularly striking because res judicata principles provide an established framework for determining the relevant "issues" in common between two judicial proceedings and for setting the boundaries of legitimate exercises of judicial authority. Of course, those principles support the Eighth Circuit's focus on particular legal issues before the courts rather than the general issue identified by the United States.

and whether the particular predicates to relief under the Special Measures Law, including the existence of an order under the 1916 Act, exist. In contrast, State Department officials and their Japanese counterparts have been addressing and continue to address the scope of and remedies for any "dumping" of printing-press equipment and other goods. They, along with European diplomatic officials, have negotiated extensively and have pressed their positions on this trade policy issue before specialized international bodies designed to address just such disputes. See US Br. 2-4; see also, *e.g.*, Dispute Settlement Body Action, *United States – Anti-Dumping Act of 1916*, WT/DS136/8, WT/DS162/11 (Oct. 2, 2000). The United States faults the Eighth Circuit for failing to focus on that general trade policy issue rather than the legal determinations underlying the District Court's order.

The United States' mistake in too broadly characterizing the relevant "issue" at hand would lead Article III courts to intervene in policy matters more properly addressed as a diplomatic matter between governments. The Special Measures Law is simply one form of self-help that one government – here, Japan – can take when another violates an international legal obligation, as the WTO determined the United States did through the 1916 Act. The Japanese government might have as readily levied a tax on petitioner's trade, with proceeds to be paid to respondents, or imposed sanctions against respondents' competitors designed to compensate respondents for the United States' violation of international obligations. Under the United States' reasoning, these measures, just as much as the Special Measures Law, would have undermined the district court judgment in favor of petitioner. They

would have presented the same "issue," justifying an injunction against respondent or, conceivably, others who sought to undermine the financial effect of the U.S. judgment. But clearly, no principle of res judicata would provide authority for a court to exercise such extraordinary powers. Few constraints on the courts' injunctive powers would remain if, as the United States proposes, the relevant "issue" common to domestic and foreign proceedings is the general, diplomatic dispute defined without regard to the particular legal issues before the relevant courts.

3. The final "error" asserted by the United States concerns the weight the Eighth Circuit accorded Congress' prospective repeal of the 1916 Act. This claim reflects a basic disagreement between the United States and the Eighth Circuit regarding the proper judicial role in international trade disputes, and here the Eighth Circuit is clearly correct and strongly supported by this Court's decisions.

The United States claims that "the public laws enacted by Congress embody, by definition, the public policy of the United States" and "the prospective repeal of the 1916 Act brought the United States into conformity with" its international obligations. US Br. 15, 16. The Eighth Circuit erred, in this view, by not according greater weight to this public policy. *Id.* at 16.

This incorrectly characterizes the Eighth Circuit's treatment of the issue. In fact, the Eighth Circuit simply rejected the district court's view that the "policy" embodied in the prospective repeal of the 1916 Act "confers jurisdiction upon the court to maintain authority over the parties" and instead held that "[o]ur consideration of international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures

Law." Pet. App. 55a, 56a. Nowhere does the United States explain how the public policy that it finds in the repeal of the 1916 Act could justify an otherwise improper antisuit injunction. Nor could it. In addition, the Eighth Circuit correctly relied on international comity. That principle "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987); *Laker Airways Ltd.* v. *Sabena, Belgian World Airways*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[C]omity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations."). However much the United States believes the Eighth Circuit should have advanced the government's rather strained view of U.S. compliance with its international obligations, controlling legal principles required the Eighth Circuit to attend to the impact that its decision might have on Japan's judicial processes.

More broadly, the United States' objection to this aspect of the Eighth Circuit's reasoning rests on a misguided conception of the judicial role in international disputes. Just as the United States would have courts issue injunctions based on the underlying diplomatic "issue" arising between the nations, so does it invoke "the position of the United States" on international "public policy" to determine the Eighth Circuit's proper exercise of injunctive powers. Courts are not, however, auxiliaries of the Executive Branch in the conduct of foreign affairs. Quite the contrary: "This result would be particularly anomalous in light of the principle that '[t]he conduct of the foreign relations of our Government is

committed by the Constitution to the Executive and Legislative – "the political" – Departments.'" *Medellin* v. *Texas*, 128 S. Ct. at 1366 (quoting *Oetjen*, 246 U.S. at 302). Contrary to the United States' argument, "'[t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided'" *Id.* at 1363 (quoting *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829), *overruled on other grounds*, 32 U.S. (7 Pet.) 51 (1833)).

Finally, the United States claims that there was no basis for the Eighth Circuit to await the outcome of the Japanese proceedings. US Br. 16. This view considerably underestimates the complexity of the Japanese proceedings and the difficulties they would present for this Court's review of the case. The Japanese proceedings are ongoing. Petitioner has advanced a range of arguments in those proceedings that may lead to a ruling in its favor. Those proceedings may, indeed, be concluded at the trial level prior to the issuance of any decision by this Court. These practical considerations provide yet a further reason why this Court's review is unwarranted.

CONCLUSION

For the foregoing reasons and those stated in our previously filed opposition, the petition should be denied.

Respectfully submitted,

HOKEN S. SEKI
LAW OFFICES OF HOKEN S. SEKI
225 Deerpath Road
Suite 224
Lake Forest, IL 60045
(847) 234-5252

PETER J. TOREN
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
LAWRENCE R. WALDERS
NEIL R. ELLIS
RICHARD D. KLINGLER
BRIAN E. NELSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc.

* Counsel of Record

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